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SUBJECT: CWC: GUIDANCE FOR CONSULTATIONS ON SITUATIONS
NOT FORESEEN BY THE CONVENTION

REFS: A) EC-58/9 (Report of the Fifty-Eighth Session of
the Executive Council, October 16, 2009)

B) EC-58/NAT.12 (Russian Federation Statement on
EC-58 draft Report paragraph addressing guidelines
development, October 16, 2009)

C) 2009 State 116094 (CWC: Development of
Guidelines for RCW in Situations Not Foreseen by the
Convention)

BACKGROUND

11. (U) The October 13-16, 2009 session of the Executive Council (EC-58) established a facilitation to develop guidelines for the security and destruction of chemical weapons (CW) that come into the possession and/or control of a State Party or States Parties in situations not foreseen by the convention, including conflict situations and otherwise? (Ref. A). The only session of this facilitation took place on November 19, 2009 under the leadership of Mr. Michael Hurley as facilitator. The November session provided interested delegations with an opportunity to exchange views on the intended results and scope of the mandate for the facilitation.

12. (U) Three delegations have provided insight on their positions. In October 2009 (as a national paper at EC-58), the Russian Federation stated its position that the scope of the guidance should be confined to "conditions of armed conflict" (Ref. B). The UK circulated draft guidelines to a few selected States Parties that did not further define the scope of "situations not foreseen by the convention," leaving open the applicability to all possible scenarios. The UK draft also contained text that appears to make the guidelines legally binding and contains elements for transparency while acknowledging the need for operational security and safety considerations. South Africa has circulated draft text that is legally binding in form and contains unrealistic, specific deadlines for recovering States Parties' communication with the Technical Secretariat (TS). It would also permit the EC to agree to alternative verification and destruction measures.

13. (U) The U.S. position is that the guidance should be limited in scope to the recovery of CW from a non-state party during armed conflict situations; that the guidance must be composed of political commitments, not legally binding obligations; and that the timing of actions taken under the guidelines must be governed by the reality of operational security and safety considerations, rather than firm, fixed deadlines. Guidance provided for the November facilitation articulates the U.S. position on these and other aspects of appropriate guidelines that still apply (Ref. C).

14. (U) On January 15, 2009, the facilitator provided the U.S. Delegation (Del) with a copy of his draft guidelines and on January 19th announced planned

consultations on January 27th and February 3rd. The facilitator apparently developed his draft in consultation with the TS, but without direct participation by any delegation. The TS distributed copies of the facilitator's draft to all OPCW delegations, also on January 19th.

15. (SBU) The facilitator's draft is inconsistent with the U.S. position in several critical respects.

-- Scope. The draft guidelines would potentially apply to all occurrences of CW "discovery" under ill-defined and ambiguous conditions described as the occurrence of an irresistible force or an unforeseen event. The United States supports a scope that is limited to recovery and destruction of CW during armed conflict situations from States not party to the Chemical Weapons Convention (CWC). The limited approach described in the U.S. position is consistent with the scope of the issue as originally raised, and consistent with consultations that led to the authorization of this effort by the EC. The situation of armed conflict is the only situation clearly defined and ripe for resolution in connection with this proposed guidance.

-- Legally binding. Although the facilitator has indicated that his draft guidelines are not intended to be legally binding, the draft text contains language that would make its provisions legally binding. Promulgating legally binding commitments does not appear to be within the authority of the EC. Furthermore, by the terms of the EC-58 Report (Ref. A), the EC has not authorized the facilitator to negotiate new legally binding obligations on this subject. The guidelines can only constitute politically binding transparency measures.

-- Rigid reporting timeframes. The draft includes specific deadlines (e.g., not later than 30 days). The United States cannot support firm deadlines for taking action under the guidelines. Such deadlines may be untenable for any number of reasons under armed conflict situations. Rather, the United States favors the development of non-specific timeframes for taking action, such as "as soon as practicable" or "as soon as operational security and safety considerations will permit." If more specific timeframes are included, they must be qualified with such terms.

-- CWC declaration. The draft is structured to include declaration of discovered CW under all possible scenarios. The U.S. position is that declaration under the CWC of CW discovered (recovered) and destroyed under armed conflict situations is inappropriate as such situations were not envisaged by the CWC. This view was confirmed by the terms of the EC Report authorizing paragraph that described these situations as events not foreseen by the CWC (Ref. A). This is also the view of the UK legal authorities and Legal Adviser of the OPCW Technical Secretariat. Although the States Parties could agree to utilize procedures that parallel the CWC declaration process, direct application of CWC declaration procedures implies that the recovered CW falls wholly within the CWC and would therefore be misleading and inappropriate.

GUIDANCE

16. (SBU) U.S. proposals may be met with suspicion and even rejected by some delegations. Therefore, it is important that Del maintains a constructive profile during the January 27th consultations and elicits the views of other delegations. During the January 27th, February 3rd, and future consultations, Del should draw upon the background above and the following points, as appropriate, to clarify the U.S. position and attempt to move the facilitation away from the facilitator's text as drafted and in a direction consistent with the U.S.

position:

-- The United States appreciates the significant amount of work by the facilitator in developing this draft. However, the United States is very concerned with the new direction taken in this draft - both in structure and content. This draft departs from both the earlier proposals and the agreed tasking, which is understood to be drafting guidelines to cover a very limited number of possible events not envisaged by the drafters of the CWC, such as the recovery of CW munitions from a non-state party under armed conflict situations. Without significant revision, the United States cannot support the use of this draft, even as a basis for consultations.

-- The draft reads as if it is intended to be legally binding. The EC has not authorized the development of new legal obligations. The guidelines are intended to be politically binding only.

-- The scope of the draft goes well beyond the immediate need for guidance in the event of the recovery of CW from a non-state party during armed conflict situations. The guidelines, as drafted, could be viewed as applying to a broad range of situations involving CWC implementation, such as reporting, verification, and destruction activities, which could have detrimental effects. This would open an avenue for potential abuse. For instance, if an unforeseen event makes it impossible for the TS to conduct on-site site inspections (per paragraph 5 of the draft), alternative means of verification would be permitted, perhaps undermining the CWC.

-- The use of the definition of "force majeure" as a criterion for application of the guidelines is inappropriate, since the understanding and application of this concept vary considerably internationally. Its use could potentially allow countries to circumvent ongoing verification of declared stockpiles and their destruction.

-- In addition to general U.S. concerns regarding the scope and legally binding nature of the drafted guidelines, the United States has concerns with specific aspects of the draft. For example, during armed conflict situations, the appropriateness of requiring declarations remains unsettled, and imposition of the CWC declaration requirements would seem to be premature and presumptive. The CWC declarations process presumes a peacetime environment, and direct application of those procedures implies that the recovered CW are to be treated the same as any other CW under the CWC. As these events are situations that the EC has agreed are unforeseen by the CWC, this practice would be misleading and lead to confusion and dispute. Furthermore, the establishment of rigid timeframes, as suggested in paragraph 4(a) of the draft, appears to be in conflict with the nature of the subject - armed conflict situations.

-- The United States believes that basic parameters such as scope of applicability and legal status need to be agreed to before any drafting exercise will be useful.

-- The document is too long and complex, and is likely to lead to a lengthy textual negotiation and, if approved, disputes in its application. The guidelines should be a much simpler document, structured along the lines of the draft prepared by South Africa.

17. (U) Del should encourage the facilitator to keep the South African text on the table for consideration as a model for the structure of the guidelines, and work to shift the conversation towards a similar approach and away from the form and detail of the facilitator's draft.

CLINTON